



APPENDIX "A".

March 23, 1937.

Honorable A. L. Crable,
State Superintendent of Public Instruction Building.

DEAR SIR:

The Attorney General acknowledges receipt of your letter February 15, 1937, wherein you ask:

"You will recall that Senate Bills 1 and 3, enacted by the Extraordinary Session of the Legislature in December, 1936, appropriated the total sum of \$300,000.00 for the purpose of purchasing textbooks to be given to children of certain classes as defined in said bills.

"In view of Section 5, Article II, of the Oklahoma Constitution, we shall appreciate an opinion from you as to whether or not the books provided in the two bills mentioned might legally be distributed to children attending parochial, sectarian, or other private schools, as well as to the other classes of children mentioned in the bills."

Senate Bill No. 1, *supra*, went into effect on January 4, 1937. The title of said Act is as follows:

"An Act making an appropriation of \$150,000.00 out of any moneys in the State Treasury not otherwise appropriated *to purchase text books to be furnished free by the State to children of drought-stricken farmers, laborers and other children whose parent or guardians are unable to purchase necessary school books: providing for the distribution thereof, and declare an emergency.*"

Section 1 of said bill is as follows:

"There is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars *to pay for purchasing free textbooks by the State of Oklahoma for the children of drought-stricken farmers of the State, laborers and other children who have parents or guardians unable to purchase necessary school books.*"

It will be noted that the underlined portion of section 1, supra, is in exact harmony with the underlined portion of the title of said act. Section 2 of said bill makes it the duty of the County Welfare Boards of Oklahoma to distribute the textbooks above mentioned. It will be noted that neither that part of the title nor body of said Senate bill which refers to the making of said appropriation and to the distribution of said textbooks, contains language limiting the application thereof to the purchase or distribution of said school books for or to the children of drought-stricken farmers, etc. who attend the *free* public schools of the state, or language prohibiting the purchase or distribution of such books to like children who attend "parochial, sectarian, or other private schools" such as are mentioned by you. It was evidently the object of said bill to aid the children of drought-stricken farmers, etc. to obtain school books to be used by them in attending school, irrespective as to whether or not said children were attending a free public school or a parochial, sectarian, or other private school. Said object is further indicated by the fact that the County Welfare Boards of this State, whose regular relief activities are exercised for the benefit of *all* the needy citizens of Oklahoma, were selected to distribute said school books.

Senate Bill No. 3, supra, went into effect on December 16, 1936. The material part of the title of said act is as follows:

"An Act making appropriation * * * to purchase textbooks for the children of drought stricken farmers and destitute, poor and indigent school children, * * * authorizing the purchase of textbooks to be distributed to the children of drought stricken farmers and destitute, poor and indigent school children: * * *"

It will be noted that neither that part of said title which refers to the making of said appropriation or that part which refers to the distribution of said textbooks, are limited in their application to textbooks for the use of children of drought-stricken farmers, etc. who attend *free* public schools. Section 1 of said Senate Bill No. 3 is in part as follows:

"There is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, the following sums of money for the following uses and purposes, to-wit: * * * to purchase textbooks for the children of drought stricken farmers and destitute, poor and indigent school children, * * * the sum of One Million, Six Hundred Fifty Thousand (\$1,650,000.00) Dollars, * * *"

It will be noted that the above quoted portion of Section 1 of Senate Bill No. 3, supra, is in exact harmony with that part of the title of said bill which relates to the making of said appropriation, and that neither thereof contains language limiting said appropriation to the purchase of textbooks "for the children of drought-stricken farmers and destitute, poor and indigent school children" who attend the *free* public schools of the state, or prohibiting said appropriation from being used to purchase such books for like children who attend parochial, sectarian, or other private schools. In fact, when one considers the provisions of Section 57, Article 5, of the Constitution of Oklahoma, which provides that every act of the Legislature "shall embrace but one subject, which shall be *clearly expressed* in its title," it is doubtful if the Legislature could have provided in either of said bills that the appropriations made therein, as aforesaid, could be used only for the purpose of purchasing textbooks for said poor, indigent children etc. attending *free* public schools, to the exclusion of *like* children attending parochial, sectarian, or other private schools. Section 2 of said Senate Bill is in part as follows:

"There is hereby *allocated* out of the funds herein appropriated the sum of \$150,000.00, or so much thereof as may be necessary, for the purchase of school books, legally adopted by the Oklahoma State Text Book Commission, which adoptions shall not expire prior to June 1, 1938, *such books to be purchased for use* by children of farmers in drought stricken areas and *by poor, indigent school children in the public schools of the various counties of the state.* * * *"

It will be noted that the above quoted language authorizes said \$150,000.00 to be expended for the purchase of books,

not only for the use of children of farmers in the drought stricken areas, but for the use of "poor, indigent school children in the *public schools* of the various counties of the state," which latter language is susceptible of being construed to prohibit said \$150,000.00 from being expended to purchase school books for "poor, indigent school children" who do not attend *free public schools* but who do attend parochial, sectarian, or other private schools.

It is true that the words "public schools" when used in a statute, usually refer to the free public schools of the state which are supported by taxation, but, as is shown by the case of *Oklahoma Ry. Co. v. St. Joseph's Parochial School et al.*, 33 Okla. 755, 127 Pac. 1087, the object of a statute may be such as to prevent said words from having such a restricted meaning. In said case, the Supreme Court of Oklahoma, in an opinion prepared by Mr. Justice Williams, construed the meaning of the words "public schools" as contained in an ordinance of Oklahoma City granting the Oklahoma Railway Company a franchise to operate a street railway in said city, the material part of the syllabus of said case being as follows:

"* * * Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railways provides:

"*'Tickets for the use of school children shall be furnished good for one continuous passage, in quantity of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city'. Held, that 'public schools of said city' include the public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolence.'*"

In the body of the opinion of said case it is stated:

"* * * The object in view was to facilitate the education of the children of the city.* * * a fair interpretation of this contract leads to the conclusion that it covers

children under the age of fifteen years attending schools in Oklahoma City, *whether maintained by the public by taxation or by private agencies for the public by private benevolence.*"

As heretofore stated, the evident object of Senate Bill No. 1, *supra*—the companion bill to Senate Bill No. 3, and which was adopted *subsequent* thereto—is to aid the children of drought-stricken farmers, etc. to obtain school books to be used by them in attending school, irrespective of whether or not said children are attending a free public school or a parochial, sectarian, or other private school. The title and appropriating provisions of Senate Bill No. 3, reveal a like object, and, in consideration of the decision of our Supreme Court above referred to, the Attorney General is of the opinion that the use of the words "public schools" in Section 2 of Senate Bill No. 3, which words are not used in the parallel portion of the title thereof, should be construed to include the public schools of Oklahoma, whether maintained by the public by taxation or by "private agencies for the public by private benevolence," such as the parochial, sectarian and other private schools, mentioned by you.

In relation to that part of your letter wherein you ask if Section 5, Article 2, of the Constitution of Oklahoma, prohibits the distribution of said textbooks to children otherwise qualified, simply because said children are attending parochial, sectarian, and other private schools, you are advised that the material part of said section is as follows:

"No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any * * * sectarian institution *as such.*"

By an examination of Senate Bills 1 and 3, *supra*, it will be found that the textbooks purchased and distributed under the provisions thereof are purchased and distributed *for the use of school children* and not for the use of the schools they attend, and the mere fact that certain of

said children may use said books while attending schools conducted by sectarian institutions would not cause public money or property to be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of said "sectarian institution as such." In this connection attention is called to the case of *Borden v. Louisiana State Board of Education*, 138 La. 1005, 123 So. 655, in which the Supreme Court of Louisiana held:

"In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. *The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made.* True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries."

The Supreme Court of New York took the opposite view in *Smith v. Donahue*, 195 N. Y. S. 715. However, the Louisiana decision was followed in *Cochran v. Louisiana State Board of Education*, 168 La. 1030, 123 So. 664, which case was affirmed by the Supreme Court of the United States in 50 S. Ct. 335, 281 U. S. 370, 74 L. ed 913, and the Attorney General believes that it should be followed in determining the question under consideration.

In view of the foregoing, it is the opinion of the Attorney General that Section 5 of Article 2, *supra*, does not prohibit the distribution of textbooks purchased with funds appropriated by Senate Bills 1 and 3, *supra*, to children attend-

ing parochial, sectarian, and other private schools; provided such textbooks have been

“legally adopted by the Oklahoma State Text Book Commission, which adoption shall not expire prior to June 1, 1938.”

Yours respectfully,

For the Attorney General,

FRED HANSEN,

Assistant Attorney General.

Approved in Conference 3-4-37.

APPENDIX “B”.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 29,754.

MIKE GURNEY, et al., *Plaintiffs in Error,*

vs.

J. R. FERGUSON, et al., *Defendants in Error.*

Syllabus.

1. The term “sectarian institutions” as employed in section 5, article 2 of the Oklahoma Constitution includes sectarian or parochial schools.

2. A legislative act purporting to authorize or direct the payment or expenditure of public funds for transporting pupils to and from school is an enactment in the exercise of the duty and power of the state to maintain the public schools of the state under direction and authority of section 5, article 1 of the State Constitution. It authorizes and directs payment or expenditure of the public funds for school purposes and is not enacted in the exercise of the police or other power.

3. Any legislative enactment which has the effect of authorizing or requiring the use of public property or the

expenditure of public school funds in transporting pupils of a sectarian school to and from such school is violative of section 5 article 2 of the Constitution of Oklahoma. For those reasons article 11, Chapter 34 S. L. 1939, insofar as it refers to parochial schools, is unconstitutional and void.

Appeal from the District Court of Oklahoma County.
Hon. Ben Arnold, Judge.

Mandamus action to compel transportation of pupils to parochial school by means of public school buses owned and operated at public expense. Writ denied and applicants appeal.

Affirmed.

W. F. Wilson; Mont F. Highly, T. K. Quillin, W. F. Wilson, Jr., Mont F. Highly, Jr., Leo Considine, J. Frank Martin and Frank C. Love, all of Oklahoma City, Oklahoma, and T. Austin Gavin, of Tulsa, Oklahoma, for Plaintiffs in Error.

Dudley, Hyde, Duvall & Dudley, and Dennis Wright, Oklahoma City, Oklahoma, for Defendants in Error.

WELCH, C. J.

The question is whether article 11, Chapter 34, S. L. 1939 is constitutional.

The same provides:

“That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this State shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board.”

It is here sought to compel the school district officials, in conformity with said act, and by use of the public school bus and at the expense of the public school funds, to transport certain pupils on their way to and from a certain ad-

mittedly parochial school for the purpose of attending such school.

We examine the law to determine whether the trial court erred in its conclusions that the legislative act is violative of section 5, article 2 of the Oklahoma Constitution.

Such constitutional provision is quoted as follows:

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”

Plaintiffs in error base a goodly portion of their argument upon the premise that the above quoted provision of our Constitution says nothing about schools. The suggestion is made that therein lies a material distinction between such provision of our Constitution and certain constitutional provisions of other states which have there been considered in connection with similar questions. The net result of the suggestion would seem to be that the term “sectarian institution” does not include a sectarian or parochial school, leading to the ultimate result that our said constitutional provision did not inhibit the use of public funds directly for the maintenance of such a school.

We would not be inclined to accept that premise even if compelled to rely solely upon the phraseology of this particular provision. It seems to us that it would be commonly understood that the term “sectarian institution” includes a school or institution of learning which is owned and controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught in that school the religious tenets of the church.

When the interpretation suggested by plaintiff in error leads to the result that the framers of our Constitution did not intend to prohibit the direct expenditure of public funds in support of sectarian schools, then the complete error of that contention is demonstrated. It is provided in section 5, article 1 of the Constitution that the schools which the

state is authorized and directed to establish and maintain shall be "free from sectarian control." We feel there is no doubt that section 5, article 2 *supra*, prohibits the use of public money or property for sectarian or parochial schools.

It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school "as such;" that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be "utterly without substance" in *Judd v. Board of Education* 278 N. Y. 200, 15 N. E. (2d) 576. It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.

The expenditure of the public funds for the purpose here shown is confined to children attending school. Thus refuting any argument that such transportation is for the

benefit of children generally and not for schools or that such transportation is furnished in regulating traffic within the police power, or primarily in promoting the health and safety of the children of the state. In *Consolidated School Dist. v. Wright*, 128 Okla. 193, 261 Pac. 953, it was held that transportation of pupils is an act done in carrying into effect the educational program contemplated by the Constitution and statutes.

The appropriation and directed use of public funds in transportation of public school children is openly in direct aid to public schools "as such." When such aid is purported to be extended to a sectarian school there is in our judgment a clear violation of the above quoted provisions of our Constitution. It is our duty only to read the applicable provisions of the Constitution and analyze them and apply to the question here the intent and purpose disclosed by the expressions in the Constitution. That document embraces the fundamental and basic law of the state, and courts and judges, like everybody else, are bound to follow it. "It is not the province of the Courts to circumvent it because of private notions of justice or because of personal inclination" as was said in the Judd case, *supra*.

The case of *Oklahoma Railway Company v. St. Joseph's Parochial School et al.*, 33 Okla. 755, 127 Pac. 1087, did not involve the expenditure of public funds and is merely an example of the exercise of the state's function of regulating transportation companies and the case was one of construction of certain provisions of the railway company's contract and franchise. We do not believe that case is authority for the assertion that a private or parochial school is a part of the state's public school system or equivalent thereto, so as to authorize the maintenance thereof from public funds.

Our conclusion here is fully supported by the reasoning and conclusion in *Judd et al. v. Board of Education et al. supra*. Therein that court had before it a case involving the same essential facts and questions, and considered constitutional provisions of no material difference from our own in the instant respect. That court very ably collected and discussed most of the present available

authorities on the several questions presented here and in our view is acceptable as precedent herein.

Other authorities which support our present opinion and which are likewise relied upon in the Judd case, *supra*, are *State ex rel. Traub v. Frank*, (Sup. Ct. Delaware) 172 Atl. 835; *Synod of Dakota v. State*, 50 N. W. 632; *State ex rel. Van Straten v. Milquet, School Treas.* (Wis.) 192 N. W. 392; *Williams et al. v. Board of Trustees, Stanton Common School Dist.* (Ct. App. Ky.) 191 S. W. 507.

The brief for plaintiff in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and all their institutions to function and operate under church control exclusively. We agree. In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution.

The judgment is affirmed.

Corn, V. C. J., Riley, Osborn, Bayless, Hurst, and Davidson, JJ. concur.

Gibson, J. dissents.

Arnold, J. not participating.

Filed in Supreme Court of Oklahoma, Dec. 2, 1941.
Andy Payne, Clerk.

